1	IN THE SUPREME COURT OF THE UNITED STATES		
2	x		
3	ALABAMA LEGISLATIVE :		
4	BLACK CAUCUS, ET AL., :		
5	Appellants :		
6	v. : No. 13-895.		
7	ALABAMA, ET AL.; :		
8	:		
9	and :		
10	:		
11	ALABAMA DEMOCRATIC :		
12	CONFERENCE, ET AL., :		
13	Appellants :		
14	v. : No. 13-1138.		
15	ALABAMA, ET AL. :		
16	x		
17	Washington, D.C.		
18	Wednesday, November 12, 2014		
19			
20	The above-entitled matter came on for oral		
21	argument before the Supreme Court of the United States		
22	at 10:05 a.m.		
23	APPEARANCES:		
24	RICHARD PILDES, ESQ., New York, N.Y.; on behalf of		
25	Appellants.		

1	ERIC SCHNAPPER, ESQ., Seattle, Wash.; on behalf of
2	Appellants.
3	DONALD B. VERRILLI, JR., ESQ., Solicitor General,
4	Department of Justice, Washington, D.C.; on behalf of
5	United States, as amicus curiae.
6	ANDREW L. BRASHER, ESQ., Solicitor General, Montgomery,
7	Ala.; on behalf of Appellees.
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1 PROCEEDINGS 2 (10:05 a.m.)3 CHIEF JUSTICE ROBERTS: We'll hear argument in Case Number 13-895, Alabama Legislative Black Caucus 4 5 in Alabama -- v. Alabama, and Case 13-1138, the Alabama 6 Democratic Conference v. Alabama. 7 Mr. Pildes. ORAL ARGUMENT OF RICHARD PILDES 8 9 ON BEHALF OF THE APPELLANTS 10 MR. PILDES: Mr. Chief Justice, and may it 11 please the Court: 12 Alabama employed rigid racial quotas, rigid 13 racial targets to design all its black majority 14 districts based on mere racial statistics alone, and 15 then used only racial demographic data to meet those 16 targets with astonishing precision. These targets were not based on any consideration of what's required under 17 18 current conditions in Alabama as Section 5 actually 19 requires. 20 Racial quotas in the context of districting are a dangerous business. They can be a way of giving 21 22 minorities faced with racially polarized voting a fair 23 opportunity to elect, but they can also be a way of 24 unnecessarily packing voters by race in ways that

further polarize and isolate us by race.

25

- 1 CHIEF JUSTICE ROBERTS: So you want, on the
- 2 one hand -- they obviously had to move new voters into
- 3 the majority-minority districts because they were all
- 4 underpopulated, and they need to move enough so that the
- 5 minorities have an opportunity to elect candidates of
- 6 their choice, but they can't move too many because that
- 7 would be packing, correct?
- 8 MR. PILDES: Your Honor, we understand that
- 9 States are in a bind in this situation as has been true
- 10 under Title VII and under the Voting Rights Act under
- 11 Section 2.
- 12 CHIEF JUSTICE ROBERTS: So -- but they have
- 13 to do that. They have to hit this sweet spot between
- 14 those two extremes without taking race predominantly
- 15 into consideration?
- 16 MR. PILDES: They don't have to hit a sweet
- 17 pot -- spot. This Court has marked out a legitimate
- 18 path that States can take and must take to comply both
- 19 with their Section 5 obligations and with their equal
- 20 protection obligations not to use the excessive and
- 21 unjustified use of racial categories.
- 22 JUSTICE SCALIA: Well, I thought the
- 23 Section 5 obligation, gee, it -- it used to require that
- 24 there -- that there be no regression in -- in -- in
- 25 majority black districts. So if a district went from 69

- 1 percent black to 55 percent black, you would be in
- 2 trouble.
- 3 MR. PILDES: Your Honor, Section 5 has
- 4 always required no retrogression based on the ability to
- 5 elect under current conditions.
- 6 JUSTICE SCALIA: Right.
- 7 MR. PILDES: So if there's no racially
- 8 polarized voting --
- 9 JUSTICE SCALIA: And -- and they're saying
- 10 that's all we did. You know, these -- these districts
- 11 were underpopulated with respect to other ones, so we
- 12 had to move new people in them, and we had to do it in
- 13 such a way that there was still the 69 percent black
- 14 population that they're used to be in order to avoid
- 15 retrogression.
- 16 MR. PILDES: Your Honor, retrogression has
- 17 never meant merely reproducing racial statistics purely
- 18 for their own sake. It's meant preserving the ability
- 19 to elect, preserving majority and minority districts.
- 20 JUSTICE SCALIA: Oh, you can say that, but
- 21 it meant you're -- the only way to be sure you're not
- 22 doing that is maintaining the same -- the same
- 23 percentage. And that's certainly the way the Justice
- 24 Department, in the bad old days, used to interpret it.
- 25 MR. PILDES: It may be in the first decade

- 1 or so of the application of Section 5, DOJ employed
- 2 various kind of practices as you described. As our
- 3 brief documents in detail, the Department of Justice has
- 4 routinely precleared plans that reduce black populations
- 5 as long as they don't reduce the ability to elect.
- And, indeed, in Alabama in the last round of
- 7 redistricting, if you look at the blue brief of the
- 8 Black Caucus at the chart at 8A, you will see that
- 9 Alabama dramatically reduced black populations in all of
- 10 its districts in the Senate and in virtually all of its
- 11 districts in the House. And if you look at that chart,
- 12 you'll see numbers like a 12-point reduction, a 19-point
- 13 reduction, a 10-point reduction, 16-point reduction.
- 14 CHIEF JUSTICE ROBERTS: Why is that? Why
- 15 is --
- 16 MR. PILDES: They reduced districts down to
- 17 56 percent.
- 18 CHIEF JUSTICE ROBERTS: Why is that? Why do
- 19 you no longer need as high a percentage of minority
- 20 voters to maintain a situation where minority voters can
- 21 still elect their candidates of choice?
- 22 MR. PILDES: For the reasons that this Court
- 23 adverted to in Shelby County and the reasons that
- 24 Alabama rightly celebrates in its briefs. Black turnout
- 25 and black registration rates in Alabama now routinely

- 1 equal or even exceed white registration and white
- 2 turnout rates.
- 3 JUSTICE SCALIA: You realize, I assume, that
- 4 you're -- you're making the argument that the opponents
- 5 of black plaintiffs used to make here. They -- they --
- 6 they said, you know, by requiring packing of -- of
- 7 minorities into certain districts, you're reducing their
- 8 influence statewide so you -- the representatives in --
- 9 in other districts can ignore what -- what -- what the
- 10 minority wants because they're all packed into -- that's
- 11 the argument the other side used to be making.
- MR. PILDES: Yes, Your Honor. And when the
- 13 Voting Rights Act legitimately requires the use of race
- in the face of polarized voting, then there's a national
- 15 political judgment that reflects the tradeoffs, the cost
- 16 and the benefits, as there are, to designing these
- 17 districts. You can --
- 18 JUSTICE KENNEDY: Suppose -- suppose there
- 19 are Party A in 2001 takes minorities out of heavily
- 20 minority districts and puts them into opportunity
- 21 districts for political purposes. It's for partisan
- 22 gerrymandering purposes. Assume that.
- MR. PILDES: Uh-huh.
- JUSTICE KENNEDY: Party B then gets into
- 25 power ten years later. It wants to undo what Party A

- 1 did, and it puts them back into heavily populated
- 2 districts. Is there a violation when Party B does that?
- 3 MR. PILDES: There's no --
- 4 JUSTICE KENNEDY: And its -- and its -- and
- 5 we'll stipulate that its motive is simply to help its
- 6 partisan balance --
- 7 MR. PILDES: If they --
- 8 JUSTICE KENNEDY: -- or partisan imbalance.
- 9 MR. PILDES: If they do not use racial
- 10 classifications, if they do not use excessive racial
- 11 means to do it --
- 12 JUSTICE KENNEDY: No, no, they -- they do.
- 13 They put minorities back into heavily packed districts,
- 14 just as they took minorities out ten years before.
- 15 MR. PILDES: Right. But the line this
- 16 Court's precedents have drawn is precisely the line
- 17 between partisan motivations in districting and racial.
- 18 JUSTICE KENNEDY: In both of my
- 19 hypotheticals, it's partisan. In either case, is there
- 20 a violation?
- 21 MR. PILDES: If it's purely partisan in
- 22 motive and they don't use race, then there's no problem.
- 23 JUSTICE KENNEDY: No, but -- but they do use
- 24 race, but it's purely partisan. Your -- the
- 25 hypothetical is, Case 1, they find minority voters and

- 1 put them into minority opportunity districts, unpacking
- 2 the very heavily minority populated districts. Then
- 3 next party comes in and simply undoes it, and it uses
- 4 the same calculus, race.
- 5 MR. PILDES: Your Honor, the --
- 6 JUSTICE KENNEDY: Are you going to tell
- 7 me -- is it your position, and I think it may be your
- 8 position, that in the first case it's permitted and the
- 9 second case it isn't?
- 10 MR. PILDES: No, Your Honor. Our position
- is that race can't be used excessively and unjustifiably
- 12 in either case. And the three-judge court found --
- 13 JUSTICE KENNEDY: Was it unjust -- was it
- 14 unjustified in -- in -- in Case A when they were trying
- 15 to have more minority opportunity districts?
- 16 MR. PILDES: If they exceeded their
- 17 obligations under Section 2 and Section 5, if they went
- 18 beyond the limited leeway this Court has said that
- 19 States have, if they have the strong basis in evidence
- 20 that's required, if they properly interpret the Act,
- 21 that's the legitimate path States have that this Court
- 22 has marked out.
- 23 JUSTICE KENNEDY: Did they do this for
- 24 partisan purposes?
- 25 MR. PILDES: Your Honor --

- 1 JUSTICE KENNEDY: And I'm asking if Party B
- 2 can then undo it for partisan purposes, because I sense
- 3 that there's a one-way ratchet here.
- 4 MR. PILDES: I don't think that's correct,
- 5 Your Honor, and I understand the concern.
- 6 If, for partisan purposes, a legislature
- 7 passed a race-based barrier to voting, that would surely
- 8 be unconstitutional. They can't use race in the way
- 9 this Court's cases -- in the Shaw line of cases indicate
- 10 are beyond the parameters the States have. They have to
- 11 have a strong basis in evidence.
- 12 In this case, Alabama didn't even ask the
- 13 relevant legal question. Alabama didn't ask what is
- 14 necessary to preserve the ability to elect, what might
- 15 be necessary to preserve the ability to elect. They
- 16 just reproduced numbers, statistics, and the way they
- 17 did it is they just used racial data.
- JUSTICE ALITO: Well, you began by -- by
- 19 criticizing Alabama for supposedly imposing quotas. But
- 20 listening to your argument, it sounds to me that you are
- 21 just as interested in quotas. You're just interested in
- 22 lower quotas.
- 23 MR. PILDES: Your Honor, right --
- JUSTICE ALITO: So if you -- if they want to
- 25 keep it at 70 percent, that's -- that may be

- 1 illegitimate in your view. But if they take it down to
- 2 the minimum that would be required in order to produce
- 3 the desired result, that's a -- that's a -- a
- 4 permissible quota. So why are you using this term
- 5 "quota" at all?
- 6 MR. PILDES: We don't have to use the word
- 7 "quota."
- 8 JUSTICE ALITO: Well, why did you use it?
- 9 MR. PILDES: I actually meant to use the
- 10 word "racial targets." Judge Thompson used the word --
- 11 JUSTICE ALITO: You think there's a
- 12 difference between the two?
- 13 MR. PILDES: Well, there's a lot of
- 14 rhetorical and inflammatory power in the word "quota."
- But, Your Honor, the point here is that
- 16 there must be at least legitimate basis for racial
- 17 classification.
- 18 JUSTICE BREYER: So that's to Justice
- 19 Kennedy's question, I thought your answer would be there
- 20 isn't a one-way ratchet. That's Cromartie 2, isn't it?
- 21 MR. PILDES: If you're use --
- 22 JUSTICE BREYER: Doesn't Cromartie 2 say if
- 23 you're doing this for political reasons, because many,
- 24 many African-Americans vote Democrat, all right? And so
- 25 what they're doing is they're trying to help the

- 1 Democrats. So, yeah, we're trying to help the
- 2 Democrats. Okay.
- 3 If that's what you can -- are doing and they
- 4 can't really prove the contrary, the burden is on the
- 5 one attacking the district, whether they are doing it by
- 6 removing some African-Americans from this one or by
- 7 putting more into it, it's the same issue. Am I right?
- 8 MR. PILDES: Yes, you're right. And
- 9 that's --
- 10 JUSTICE BREYER: Right. Then it's not a
- 11 one-way ratchet. It is a two-way ratchet, which --
- 12 JUSTICE SCALIA: And it's valid in both --
- in both cases. That's your problem.
- MR. PILDES: If --
- 15 JUSTICE BREYER: That's not our case because
- 16 our case, they don't try to defend on that ground.
- 17 MR. PILDES: Right. And that's -- your
- 18 answer is exactly the answer I was trying to give to
- 19 Justice Kennedy, which is partisan manipulation, this
- 20 Court has said, may be fine and constitutional, but the
- 21 one thing you cannot do is use race as a proxy for
- 22 politics or political affiliation. You cannot use
- 23 racial targets that don't have a legitimate
- 24 justification. They're not tied to current conditions.
- 25 JUSTICE SCALIA: You don't -- I thought you

- 1 agreed with Justice Breyer.
- 2 MR. PILDES: I do --
- 3 JUSTICE SCALIA: But now you're saying you
- 4 cannot use race as a proxy for political affiliation,
- 5 but that was his hypothetical --
- 6 MR. PILDES: I thought --
- 7 JUSTICE SCALIA: -- that these people were
- 8 moved because blacks overwhelmingly vote Democrat.
- 9 MR. PILDES: Your Honor --
- 10 JUSTICE SCALIA: You're saying that's bad if
- 11 that's the reason they move them. I don't think he
- 12 thinks that's bad.
- 13 MR. PILDES: I understood Justice Breyer to
- 14 be describing the situation in which you're moving
- 15 people because they're Democrats. You have voting
- 16 behavior data. You look at the data. You move people
- 17 based --
- 18 JUSTICE SCALIA: No, you're moving them
- 19 because they're black, and you think blacks will
- 20 overwhelmingly vote Democrat. That's why you're moving
- 21 them, because they're black. Because we assume blacks
- 22 are overwhelmingly Democrats.
- 23 MR. PILDES: Your Honor, in this area, the
- 24 Court has said that assumptions like that cannot be the
- 25 basis of the way district lines are drawn or the way

- 1 people are classified by race.
- 2 JUSTICE GINSBURG: Mr. Pildes, because --
- 3 because your time is running out --
- 4 MR. PILDES: Yes.
- 5 JUSTICE GINSBURG: -- there is -- in your
- 6 presentation, you're saying we are attacking the
- 7 statewide plan. We are not picking one district or the
- 8 other. And you have been attacked on that point. The
- 9 attack is that Shaw claims have to be district by
- 10 district; they can't be statewide. So I would like your
- 11 answer to that question. There hasn't been a Shaw
- 12 claim, as far as I know, that was statewide. They have
- 13 all been district by district.
- 14 MR. PILDES: Your Honor, our claim is that
- 15 the exact same policy was applied in every black-
- 16 majority district, which is we will use racial data to
- 17 repopulate as close as we can possibly do it to the
- 18 exact same black percentage. That's a policy applied in
- 19 every -- in all 36 districts.
- 20 JUSTICE SCALIA: And how -- how are your
- 21 clients hurt by that? It seems to me you have to come
- 22 up with a client in one of the other districts that
- 23 would have been, as you put it, more competitive had
- 24 this packing not occurred.
- 25 MR. PILDES: Your Honor --

- 1 JUSTICE SCALIA: I assume that's the harm
- 2 that -- that you're alleging.
- 3 MR. PILDES: Your Honor, we -- the record
- 4 demonstrates that we have plaintiffs or we have members
- of the ADC in many of the black majority districts at
- 6 issue, and that at least is sufficient for us to
- 7 challenge this policy, at least as applied in those
- 8 districts.
- 9 JUSTICE SCALIA: I thought the record just
- 10 showed that you -- you named your plaintiffs by county
- 11 rather than district.
- MR. PILDES: But many of the districts are
- 13 wholly contained within the county. They occupy the
- 14 full county. We demonstrate in our brief a number of
- 15 senate districts and many house districts that are whole
- 16 county districts.
- 17 JUSTICE SOTOMAYOR: Are you dependent on
- 18 your district by district challenge? Does your claim
- 19 rises and falls solely on this statewide point you make?
- 20 MR. PILDES: By statewide, we simply mean a
- 21 common policy applied to every district in the State.
- 22 And Mr. Chief justice, if I may reserve the
- 23 balance.
- 24 CHIEF JUSTICE ROBERTS: Thank you, counsel.
- Mr. Schnapper.

- 1 ORAL ARGUMENT OF ERIC SCHNAPPER
- 2 ON BEHALF OF APPELLANTS
- 3 MR. SCHNAPPER: Mr. Chief Justice, and may
- 4 it please the Court:
- 5 This Court's Shaw jurisprudence channels the
- 6 conversation that we're having today. This Court has
- 7 identified two constitutional claims that could be
- 8 raised with regard to the use of race in districting.
- 9 One is intentional dilution of minority votes for the
- 10 purpose of minimizing their effectiveness and the second
- 11 one is Shaw. This is -- we're advancing a Shaw claim.
- 12 JUSTICE SOTOMAYOR: You lost on the dilution
- 13 claim.
- MR. SCHNAPPER: We did. We did. The facts
- 15 material to the Shaw claim are -- were not in dispute at
- 16 trial. The question is whether they fall within the
- 17 concept of predominance in this Court's line of
- 18 decisions.
- 19 JUSTICE ALITO: Did the district court
- 20 understand you to be asserting a district-specific --
- 21 district-specific claims?
- 22 MR. SCHNAPPER: I think it understood us to
- 23 be challenging each of the districts.
- JUSTICE ALITO: Where -- where do you find
- 25 that in the -- in the opinion of the district court? I

- 1 thought the district court interpreted you not to be
- 2 making that claim.
- 3 MR. SCHNAPPER: I -- we -- we advanced
- 4 evidence as to the motive that was a motive common to
- 5 all the districts and then we advanced -- offered
- 6 evidence about particular districts to illustrate how
- 7 that was played out. But this is not -- there's no
- 8 conceptual difference between challenging all 36
- 9 districts and challenging 36 districts. It -- it's the
- 10 same claim.
- 11 JUSTICE GINSBURG: But you mean had specific
- 12 -- in your proposed findings, you dealt specifically
- 13 with certain districts and not specifically with others.
- 14 MR. SCHNAPPER: The specific information
- 15 dealt with many of the particular districts, but the
- 16 claim was that all of the districts were the result of a
- 17 common purpose, that that common -- and that common
- 18 purpose race was the predominant and overriding --
- 19 JUSTICE SCALIA: But some of the districts
- 20 were unchanged. The percentage was exactly the same as
- 21 it was before. Those are the only districts that your
- 22 clients were from. How have they been harmed?
- 23 MR. SCHNAPPER: Our -- our clients -- we
- 24 have members in all the districts. The theory of harm
- 25 in the Shaw line of cases --

- 1 JUSTICE SCALIA: Was that established in the
- 2 district court, that you have members in all the
- 3 districts?
- 4 MR. SCHNAPPER: That was the finding of the
- 5 district court. The Alabama legislature -- because this
- 6 concerned the black districts --
- 7 JUSTICE SCALIA: The finding of the district
- 8 court was that you have -- you have members --
- 9 MR. SCHNAPPER: I think it said all or
- 10 virtually all. But that wasn't -- our standing wasn't
- 11 in dispute. But the -- the concept of injury in the
- 12 Shaw line of cases is -- is not injury to the
- 13 individuals who were in the districts that are -- become
- 14 whiter because blacks are moved out. That is -- those
- 15 are the people who don't have standing.
- 16 In Hays, this Court made clear it's the --
- 17 it's the individuals in the districts into which blacks
- 18 are put for the predominant racial purpose of -- for
- 19 predominant racial purpose. That's -- that's the
- 20 standing doctrine that this Court has announced in those
- 21 cases.
- 22 Predominance involves, under this Court's --
- 23 JUSTICE SCALIA: I don't understand what you
- just said. They have a claim because there are too many
- 25 blacks in their district?

- 1 MR. SCHNAPPER: No. It's not about the
- 2 number. The theory of the Court in Shaw is that if race
- 3 is the predominant purpose in putting blacks into a
- 4 district, that that will likely result in
- 5 representational harm in terms of the way the elected
- 6 officials will act. And that's been the theory of the
- 7 Shaw claims ever since Shaw.
- 8 CHIEF JUSTICE ROBERTS: And you think it's
- 9 possible for the State to navigate between not enough
- 10 minority members in the district and too many minority
- 11 members in the district without taking race into
- 12 account.
- MR. SCHNAPPER: No, we do -- we do not.
- 14 CHIEF JUSTICE ROBERTS: Race predominantly
- 15 into account.
- MR. SCHNAPPER: But Shaw -- Shaw doesn't say
- 17 that taking race into account raises a constitutional
- 18 question in all cases, particularly in -- in the wake of
- 19 this Court's decision in Easley, which made it clear,
- 20 finally resolving an issue that had been kicking around
- 21 for some time, that the fact that race was a factor in
- 22 drawing a district doesn't trigger strict scrutiny. A
- 23 majority of the Court held there that for Shaw purposes
- 24 to trigger strict scrutiny the plaintiff would have to
- 25 show predominance, that race was the predominant,

- 1 overriding purpose, meaning it was the criteria to which
- 2 -- that couldn't be put aside for any other purpose.
- 3 CHIEF JUSTICE ROBERTS: So -- so they have
- 4 to navigate between too many and too few, but without
- 5 race being the predominant consideration.
- 6 MR. SCHNAPPER: If race, if -- in terms of
- 7 the Constitution, if race isn't the predominant purpose
- 8 and dilution isn't involved, then there's no
- 9 constitutional claim. With regard to Section 5, let
- 10 me -- I think it would be helpful to understand what the
- 11 government's interpretation is and has been for sometime
- 12 about what Section 5 requires. This is reflected in the
- 13 government's brief at 22 and 23 and in the 2011
- 14 guidelines.
- 15 The government's view, and this is how --
- 16 this has long been understood, is that the black
- 17 proportion can be reduced to the point where blacks no
- 18 longer have the -- the ability to elect a candidate of
- 19 their choice. Until you get to that point, changes are
- 20 not retrogressive, and that's not the way --
- 21 CHIEF JUSTICE ROBERTS: Do you think -- what
- 22 do you think -- well, it's speculative. But I think
- 23 that if Alabama had reduced the number of minority
- 24 voters in majority-minority districts in any significant
- 25 way, the Attorney General would have come down on them

- 1 like a ton of bricks.
- 2 MR. SCHNAPPER: That -- that is not correct,
- 3 Your Honor.
- 4 CHIEF JUSTICE ROBERTS: He did preclear the
- 5 plan that you're challenging today.
- 6 MR. SCHNAPPER: He also precleared the 2001
- 7 plan which did precisely what you described. The -- the
- 8 government's view of this is set out in some greater
- 9 detail in their brief in Georgia v. Ashcroft and in
- 10 the -- in the oral argument of Mr. Stewart at the time.
- 11 As they explained then, and this remains their view, and
- 12 consistent with the way the Department has operated,
- 13 until -- the numbers can fall until it gets to the point
- 14 where the ability to elect is in question. The --
- 15 JUSTICE SOTOMAYOR: I have a problem.
- 16 Can -- can I just go back to your Shaw-nonShaw?
- 17 MR. SCHNAPPER: Yes.
- 18 JUSTICE SOTOMAYOR: Basically, you're saying
- 19 I don't have a Shaw challenge.
- 20 MR. SCHNAPPER: I have a Shaw challenge.
- JUSTICE SOTOMAYOR: All right. You're
- 22 claiming it's a Shaw challenge, but you don't have to
- 23 describe the injury. It's a -- it's an ephemeral
- 24 injury; race played a part in the overall plan, without
- 25 an effect in a particular district.

- 1 MR. SCHNAPPER: No, no.
- 2 JUSTICE SOTOMAYOR: If a particular
- 3 district --
- 4 MR. SCHNAPPER: No.
- 5 JUSTICE SOTOMAYOR: I mean, if it stayed
- 6 essentially the same, they didn't move the boundaries
- 7 much, they obviously -- they don't -- it's an all-white
- 8 district. If they moved the boundaries, it wasn't to
- 9 include more blacks or anything else. It was just
- 10 because of -- of geographic divisions. So explain to me
- 11 why you don't have to prove that you were harmed
- 12 specifically by the application of this policy.
- 13 MR. SCHNAPPER: Let me say two things in
- 14 response to that. First, the -- the theory of Shaw is
- 15 that if black voters are, for a predominantly racial
- 16 reason, moved into a district, not just leave it alone,
- 17 moved into a district for predominantly racial reasons,
- 18 that would strict scrutiny. Now --
- 19 JUSTICE SOTOMAYOR: But that wasn't true
- 20 any --
- 21 MR. SCHNAPPER: Yes, it is. Yes, it is,
- 22 Your Honor. When one of the member of the court said
- 23 the districts hadn't changed, I think what he meant was
- 24 that the black percentage hadn't changed. All of these
- 25 districts changed. They were underpopulated by on

- 1 average about 15 percent. There's an average of 6,000
- 2 voters, individuals, put in every house district, 20,000
- 3 in every senate district.
- 4 JUSTICE ALITO: Well, explain -- now that
- 5 you're talking about districts, could I come back to the
- 6 question I asked at the beginning, so that I understand
- 7 what we have to decide. On page 128 of the Joint
- 8 Appendix, there's a paragraph in the district court
- 9 opinion that explains what the district court understood
- 10 to be -- to be before it on the issue of intentional
- 11 discrimination. I see nowhere any indication that the
- 12 district court construed your pleadings and your other
- 13 submissions to raise a claim about any specific
- 14 district.
- The third point is we construe the filings
- 16 of the Democratic Conference plaintiffs as arguing that
- 17 certain senate districts constitute racial gerrymanders.
- 18 There's nothing with that with respect to your client.
- 19 Maybe I'm missing something. So if that's how the
- 20 district court understood your position, then maybe it
- 21 was wrong, but that would be the threshold question we'd
- 22 have to decide, wouldn't it be, that if you have to be
- 23 district-specific, we would have to say the district
- 24 court misunderstood the claims that you were asserting?
- 25 MR. SCHNAPPER: I think in the context of

- 1 the way the case was litigated and tried and the briefs
- 2 at the time, it was -- everybody understood the
- 3 plaintiffs were challenging all of the majority-black
- 4 districts.
- 5 JUSTICE ALITO: The district court
- 6 understood that? Then why did it include this paragraph
- 7 and why did it not go through any districts that it saw
- 8 you as challenging? It went through some that it saw
- 9 the other plaintiffs as challenging, none with respect
- 10 to you.
- 11 MR. SCHNAPPER: We think in the context in
- 12 which the case was litigated, there was no conceptual
- 13 difference between challenging all the 36 districts and
- 14 challenging 36 individual districts. The reason the
- 15 opinion reads the way it does is that the State didn't
- 16 contend and we didn't contend that there was different
- 17 district-specific purposes afoot. The State's account
- 18 of this, which everyone accepted, was that the State had
- 19 a common purpose in adding those thousands of
- 20 individuals to each district, which was to -- which was
- 21 to continue the black percentage as it had been all
- 22 along. It was a purpose common to all of them.
- 23 JUSTICE KAGAN: And, Mr. Schnapper, isn't it
- 24 right that after trial, when you submitted proposed
- 25 findings of fact and conclusions of law, in fact, you

- 1 did reference particular districts? You referenced
- 2 Senate Districts 18, 19 and 20. In another place, you
- 3 talked about all the majority-black districts in the
- 4 State's black belt, and you explained how your theory of
- 5 the case related to each one of those districts.
- 6 MR. SCHNAPPER: We did. This -- this is
- 7 somewhat analogous to the Teamsters decision from back
- 8 in the 1970s. For the government to prove racial
- 9 discrimination in promotions, it made out a pattern and
- 10 practice case by offering evidence that was class-wide,
- 11 that affected all the individual blacks and Hispanics,
- 12 and then offered some individual stories. But the claim
- 13 was for all of the individuals who worked in those -- in
- 14 those facilities.
- 15 JUSTICE BREYER: To get there, we'd have --
- 16 you're talking, about, second, we construe the filings
- of the Black Caucus plaintiffs as arguing that the acts
- 18 as a whole constitute racial gerrymandering, so we'd
- 19 have to say that was wrong, they didn't get the
- 20 complaint right, send it back.
- 21 So if we're going to have to send it back, I
- 22 guess what you'd have to -- would there be anything
- 23 wrong with saying this: Look, tell the plaintiffs
- 24 please to point district by district to the fact that
- 25 the primary motive here was racial. I don't think that

- 1 would be too hard. We have loads of evidence on that.
- Now, if the primary is racial -- and this is
- 3 the crucial part -- they then to justify this have to
- 4 show that they are making a -- and I don't know what
- 5 word -- reasonable attempt, good faith reasonable
- 6 attempt, some other word, to comply with the section,
- 7 old Section 5 requirements, with the Section 5
- 8 requirements. And now they have to do it over again
- 9 anyway and so they do it over again, and if in fact some
- 10 of the questions suggest that that is what they were
- 11 trying to do; and you'd have evidence there that said,
- 12 no, no, that isn't what they were trying to do. They
- 13 didn't even read the guidelines of the attorney general.
- 14 They didn't even look at what happened in the past.
- 15 They made no such attempt. All right. So would there
- 16 be, from your point of view, anything wrong with that
- 17 holding?
- 18 MR. SCHNAPPER: Well, Your Honor, I think
- 19 with regard to the question of justification, we think
- 20 it doesn't make any sense, in light of this Court's
- 21 decision particularly in Shaw 2, to send it back. The
- 22 Court's decision makes clear that there are three
- 23 parameters to the way you assess this: First, what they
- 24 did is to be judged by the correct interpretation of the
- 25 statute, not what they might have thought in good faith

- 1 it meant. Second -- and the word "correct" is in a
- 2 number of this Court's Shaw decisions.
- 3 Secondly, that the purpose to comply with
- 4 the correct interpretation has to have been their motive
- 5 at the time; and secondly, at the time, not at trial,
- 6 but back when they did this, they had to then, in 2012,
- 7 have had a strong basis in evidence for concluding that
- 8 not using all these different numbers would have
- 9 violated the statute. They don't -- they can't satisfy
- 10 any of those things. They can't go back -- you could
- 11 send the case back to the district court, but you can't
- 12 send the case back to 2012 and have them change the
- 13 purpose or change the evidence before them.
- So, unless you're going to change the
- 15 standard of strict scrutiny this Court has applied in
- 16 Shaw and other affirmative action-related cases, you
- 17 could not do that. It's just -- it's years too late for
- 18 them to solve those problems.
- 19 JUSTICE SOTOMAYOR: I'm still having a
- 20 psychological problem with your point. There were three
- 21 reasons. You're saying merely because it was one among
- 22 the three, it necessarily was predominant as to each
- 23 district created. The example or hypothetical I posited
- 24 for you was the primary reason above all others that
- 25 they said is the 2 percent district, and there may be

- 1 districts among these 36 that, as I indicated, had
- 2 contiguous populations that didn't make a difference
- 3 about race. So it didn't -- they are not affected by
- 4 this policy. Why should we undo that?
- 5 MR. SCHNAPPER: Okay. Okay. I'm just going
- 6 to answer the one last question. In fact, as the
- 7 analysis of the precinct-splitting shows, with perhaps
- 8 two exceptions, there is race-based precinct-splitting
- 9 on the border of every one of the majority-black
- 10 districts in question here. It wasn't a situation where
- 11 they just took the neighboring districts and they turned
- 12 out to replicate, to be just the ratio that they wanted.
- 13 It was very, very calculated and race-based.
- 14 CHIEF JUSTICE ROBERTS: Thank you, counsel.
- 15 General Verrilli.
- ORAL ARGUMENT OF DONALD B. VERRILLI, JR.,
- 17 FOR THE UNITED STATES, AS AMICUS CURIAE
- 18 SUPPORTING NEITHER PARTY
- 19 GENERAL VERRILLI: Mr. Chief Justice, and
- 20 may it please the Court:
- 21 The key point in this case is that Shaw
- 22 claims require district-specific analysis. The district
- 23 court departed from that principle and in our judgment
- 24 the plaintiffs' main theory also departs from that
- 25 principle, and I'd like to address --

- 1 JUSTICE KAGAN: I don't understand why
- 2 that's so, General. I mean, what the plaintiffs are
- 3 saying is yes, we have common evidence, not all together
- 4 usual in a Shaw claim, but here they have evidence.
- 5 It's a policy statement that retrogression was going to
- 6 be a very main priority. I think it was number 2. And
- 7 retrogression was defined in a certain way, as requiring
- 8 the maintenance of black voting population. And that
- 9 was going to be taken into account in every single
- 10 majority minority district.
- Now, the fact that there's evidence, the
- 12 principal evidence in the case, that relates to every
- 13 single district and so in a sense the evidence is
- 14 statewide, does not make it any less a district by
- 15 district case.
- 16 GENERAL VERRILLI: That may be right,
- 17 Justice Kagan, but it also doesn't prove that race
- 18 predominated in the Shaw sense with respect to each
- 19 specific district, and let me try to explain why. The
- 20 test under Shaw is whether race predominates to the
- 21 derogation of traditional districting criteria. And so
- 22 it may be that in some districts, the effort to maintain
- 23 the same African American population resulted in
- 24 judgments that -- to draw the districts in ways that
- 25 derogated from traditional districting criteria, such as

- 1 compactness and maintaining communities of interest, but
- 2 it may be in other districts that it didn't, and I can
- 3 provide specific examples of that.
- 4 JUSTICE KAGAN: Well, I guess I would
- 5 appreciate specific examples, because it seems to me as
- 6 sort of a going-in matter that when you say this is the
- 7 most important thing except for the Reynolds inquiry,
- 8 this is the most important thing, that necessarily it's
- 9 going to affect the way you redraw or who you put into
- 10 the districts.
- 11 GENERAL VERRILLI: Well --
- 12 JUSTICE KAGAN: You might not reach the
- 13 target in every single district, but necessarily you're
- 14 saying we are prioritizing this race-based -- this
- 15 race-based thing, criterion, in a way that's going to
- 16 affect every judgment we make.
- 17 GENERAL VERRILLI: But the question under
- 18 Shaw, Your Honor, as we read the Shaw line of cases, is
- 19 whether that is done in derogation of traditional
- 20 districting criteria.
- JUSTICE KAGAN: Well, how can it not be? If
- 22 you have three priorities or three criteria and you say
- 23 this is the absolute most important criteria, it's just
- 24 the natural effect of that is going to be to minimize
- 25 the other two criteria.

- 1 GENERAL VERRILLI: No, that's not
- 2 necessarily true. Sometimes they will conflict,
- 3 sometimes they won't. And I think the example -- I can
- 4 give you examples I think that would illustrate that
- 5 from the record.
- 6 For example -- now, there weren't specific
- 7 findings about these districts in the district court's
- 8 opinion, so I'm not trying to say this is what the
- 9 district court found. But with respect to some
- 10 districts, for example, House District 67, the State
- 11 argues that that was a district in which you are going
- 12 to have essentially an African American percentage at
- 13 the percentage that the district was drawn at no matter
- 14 how you drew it, and that was because the surrounding
- 15 populations around that district were all of comparable
- 16 African American percentages. So whatever choice you
- 17 made in order to get to the 2 percent
- 18 one-person-one-vote threshold was going to involve
- 19 moving African Americans. And we'd submit that's not a
- 20 situation in which race predominated over traditional
- 21 districting criteria. It's a -- it's situation in which
- 22 traditional districting criteria drove the decision.
- 23 There may, however, be other districts --
- 24 and Senate District 26 is one that comes to mind, in
- 25 which, where you had this movement of 14,500 people into

- 1 a district, which was in the City of Montgomery and
- 2 surrounding areas, all but 35 of whom were African
- 3 American. And if one looks at that map -- and actually,
- 4 it's very difficult to discern on the small maps that
- 5 are in your materials. But if you can get a blow-up of
- 6 it, what you will see in that map is that the so-called
- 7 "crab claws" that the parties describe that extend out
- 8 from the district capture African American populations.
- 9 What they do is carve out the white part of the City of
- 10 Montgomery and attach it by a very narrow land bridge to
- 11 the next --
- 12 JUSTICE KENNEDY: But suppose they did that
- 13 based on economic data?
- 14 GENERAL VERRILLI: Then I think it would not
- 15 be a problem, Your Honor.
- 16 JUSTICE KENNEDY: But it results in the same
- 17 thing.
- 18 GENERAL VERRILLI: Right. But it wouldn't
- 19 -- it wouldn't be race predominating over traditional
- 20 districting criteria. And I will go back and try to
- 21 answer the question that Your Honor posed earlier about
- 22 when partisanship can be a justification and when it
- 23 isn't. I think it's a very technical answer, but I
- 24 think if a State were to move electoral precincts from
- 25 one district to another, the entire electoral precinct,

- 1 because there you would have the data on how people
- 2 voted in that precinct, that would -- that would not
- 3 raise a problem under the Shaw analysis because you
- 4 clearly would be making a decision for partisan reasons.
- 5 But when you split a precinct and you move
- 6 just based on census block information, there you don't
- 7 know how the people in the census block voted. What you
- 8 know is their race. And so at that point if you're
- 9 using race as a proxy -- and I think that's what
- 10 Mr. Pildes was trying to describe to Your Honor, when
- 11 you're using race as a proxy in that circumstance, that
- 12 would violate what this Court has said in all of its
- 13 Shaw cases is the constitutional norm at stake here
- 14 because you're making an assumption. You're
- 15 stereotyping in that situation, so it's --
- 16 JUSTICE KENNEDY: And that's true at the
- 17 outset if you move them by race in order to increase
- 18 their capacity to influence districts?
- 19 GENERAL VERRILLI: Well, that's a difficult
- 20 question, Your Honor, but I think if you're -- if you're
- 21 -- if you're moving people by race in order to ensure
- 22 that you're not violating the Voting Rights Act that
- 23 seems to be one thing.
- JUSTICE KENNEDY: But then it's a one-way
- 25 ratchet.

- 1 GENERAL VERRILLI: No, I don't think it is a
- 2 one-way ratchet, Your Honor, because you can move in
- 3 both directions, just move precincts and not -- and not
- 4 census blocks.
- 5 JUSTICE ALITO: General, you say that the
- 6 district court erred in addressing the claim of racial
- 7 gerrymandering on a statewide rather than a
- 8 district-specific basis. I would assume that that was
- 9 an error on the part of the district court only if a
- 10 district-specific claim was asserted by the plaintiffs,
- 11 but you don't address that issue.
- 12 GENERAL VERRILLI: Yes. I'm happy to
- 13 address it now, Your Honor. I actually think this is
- 14 quite a murky question. I think, Your Honor -- we agree
- 15 Your Honor is quite right that the district court did
- 16 appear, and JSA 128 is the place where it seems clear
- 17 that they did to appear, to assume that this was a
- 18 statewide claim. In some respects, one can understand
- 19 why, because the basic theory is that the motive
- 20 influenced every district and it did adjudicate the case
- 21 on that basis.
- 22 So it would seem to me that one outcome here
- 23 would be to say that Shaw -- the proper understanding of
- 24 Shaw is that claims have to be made on a
- 25 district-specific basis and that the plaintiffs here

- 1 didn't -- didn't propound cognizable claims under Shaw
- 2 and that would be one resolution here. But I have to
- 3 say, the record is somewhat murky on this. Judge
- 4 Thompson in dissent did say that he thought that the
- 5 claims were district-by-district specific. Justice
- 6 Kagan has identified some information in the record. So
- 7 another option might be to articulate the correct
- 8 district-specific standard and leave it to the district
- 9 court on remand to sort out whether the plaintiff has
- 10 his facts --
- 11 JUSTICE KAGAN: But you don't deny that a
- 12 statewide policy can refer to every district or every
- 13 majority minority district in the State?
- 14 GENERAL VERRILLI: No. No, we don't deny
- 15 that, but that's not enough -- our point is that's not
- 16 enough to trigger strict scrutiny. You have to look and
- 17 see whether it's implemented in a manner that is in
- 18 derogation of traditional districting criteria district
- 19 by district.
- 20 JUSTICE KAGAN: But again -- and I don't
- 21 want to press it if you've given me your best answer to
- 22 it -- if a policy says we're going to prioritize this
- 23 particular criteria, which here was the mistaken
- 24 understanding of retrogression, if a policy says, we're
- 25 going to prioritize this over everything else, it seems

- 1 to me that that's pretty good evidence of a violation.
- 2 GENERAL VERRILLI: Only if again -- I guess
- 3 I am just going to repeat myself, but if it's in
- 4 derogation of traditional districting criteria --
- 5 JUSTICE KAGAN: But if the policy says that
- 6 it's going to prioritize it over everything else, that
- 7 means it going to be in derogation of tradition
- 8 districting criteria.
- 9 GENERAL VERRILLI: When they conflict --
- 10 JUSTICE KAGAN: Sometimes they might fail.
- 11 Sometimes you're not going to be able to prioritize it
- 12 over everything else, but the intent is still to
- 13 prioritize it over everything else.
- 14 GENERAL VERRILLI: But the question is --
- 15 let me take a step back because I think it might help to
- 16 put it in this context.
- 17 A challenge, a Shaw challenge, is a
- 18 challenge to a facially neutral government action. The
- 19 lines on the map are what are being challenged here.
- 20 That's the government action. Those lines are facially
- 21 neutral. They may, in fact, reflect a violation of the
- 22 Constitution under Shaw if race predominated in the
- 23 placement of those lines in derogation of traditional
- 24 districting criteria. But that's what you've got to
- 25 prove, and the mere existence of this motive doesn't

- 1 prove it for each district, and that's our point.
- 2 If I could, I just would like to raise one
- 3 point in my remaining time going back to the question of
- 4 what Section 5 retrogression required. Mr. Chief
- 5 Justice, you asked that question.
- 6 JUSTICE GINSBURG: And when you do that,
- 7 will you also tell us what effect, if any, the
- 8 preclearance should have.
- 9 GENERAL VERRILLI: Yes. So -- and the two
- 10 are quite related. I think Professor Pildes referred
- 11 you to this charge, but the key thing is to look at not
- 12 the difference between 2001 and the current plan, but
- 13 the difference between the 1993 plan and the 2001 plan.
- 14 The Justice Department cleared the 2001 plan
- that Alabama submitted, and you will see for every
- 16 single district listed there, with maybe one exception,
- 17 there were significant reductions in the minority
- 18 percentages in those districts. So Alabama knew
- 19 perfectly well that it was completely consistent with
- 20 its obligations under Section 5 to reduce the districts.
- 21 CHIEF JUSTICE ROBERTS: You asked for a
- 22 remand. The result of the remand may well be Alabama
- 23 has to redistrict; is that right?
- 24 GENERAL VERRILLI: Yes.
- 25 CHIEF JUSTICE ROBERTS: And when they do so,

- 1 that would not be subject to Section 5, correct?
- 2 GENERAL VERRILLI: Certainly correct.
- 3 That's certainly correct.
- 4 CHIEF JUSTICE ROBERTS: And that's not a
- 5 concern for you?
- 6 GENERAL VERRILLI: Well, it's not a concern
- 7 for us. It is what it is, Mr. Chief Justice. If on
- 8 remand the district court concludes that some of these
- 9 districts violated the Constitution, then Alabama will
- 10 have to -- the legislature will get its first chance to
- 11 a legislate a fix and Section 5 won't be a basis for
- 12 them to take any action.
- 13 CHIEF JUSTICE ROBERTS: Thank you, counsel.
- Mr. Brasher.
- ORAL ARGUMENT OF ANDREW L. BRASHER
- ON BEHALF OF RESPONDENTS
- 17 MR. BRASHER: Thank you, Mr. Chief Justice,
- 18 and may it please the Court:
- 19 I think the Court should begin with the
- 20 district court's fact-finding, because the district
- 21 court expressly found that race did not predominate and
- 22 the Court can affirm on that basis and avoid addressing
- 23 questions about Section 5 and redistricting that are
- 24 unlikely to arise again because of this Court's decision
- 25 in Shelby County.

- 1 On page 144 of the jurisdictional statement
- 2 appendix, the district court expressly found that we did
- 3 not impose a quota. The court said that we imposed,
- 4 quote, "no bright-line rule," and what the court meant
- 5 is that we preserved the core of existing districts, we
- 6 followed preexisting district lines, we followed roads,
- 7 we followed county lines, municipal lines, we met the
- 8 needs of incumbents, and we preserved communities of
- 9 interest.
- 10 The plan that we proposed -- the plan that
- 11 we passed is a status quo plan. The whole point of this
- 12 plan was to preserve the status quo because the
- 13 Republican Party had won a majority in the legislature
- 14 for first time in 130 years.
- 15 CHIEF JUSTICE ROBERTS: But the other side
- 16 says it was impermissible for you to preserve the status
- 17 quo because the opportunity for minority voters in the
- 18 majority minority districts to participate in the
- 19 electoral process had improved to the extent that
- 20 maintaining the status quo would be characterized as
- 21 packing.
- 22 MR. BRASHER: Well, actually, if you look
- 23 at -- well, two responses to that, Your Honor. The
- 24 first is that if you look at the amicus brief filed in
- 25 support of neither party by political scientists, they

- 1 show that black voter turnout and white voter turnout
- 2 and registration actually equalized in 1998. So -- so
- 3 there actually isn't some difference between the
- 4 districts in 2010 and -- and the new ones that we
- 5 propose with respect to those criteria.
- 6 The second point, I guess, I would make to
- 7 that is that our -- our redistricting criteria -- our
- 8 nonracial redistricting criteria were coextensive with
- 9 the objective here to preserve these majority-black
- 10 districts as they have been. And what I mean is that
- 11 the objective of these nonracial redistricting criteria
- 12 was to preserve the status quo. And so I think that's
- 13 what the United States Solicitor General was getting at,
- 14 is that it's difficult to disentangle the notion that we
- 15 should preserve the status quo with the majority-black
- 16 districts.
- 17 JUSTICE KENNEDY: Is -- is it fair to -- to
- 18 read the pleadings and -- and the submission in this
- 19 case as saying that the State did not defend this plan
- 20 on the basis that it was for partisan purposes, but that
- 21 it was to comply with Section 5?
- 22 MR. BRASHER: I don't --
- 23 JUSTICE KENNEDY: Is that -- is that a fair
- 24 reading of the -- A, of the red brief and, B, of what
- 25 the district court found?

- 1 MR. BRASHER: I don't think it's a fair
- 2 reading of either, Your Honor, and this is the reason
- 3 why. Certainly, with respect to specific districts
- 4 here, when they were actually challenged, we were able
- 5 to respond and say this was for partisan political
- 6 reasons. One of those districts, for example, was
- 7 Senate District 11, which was specifically challenged by
- 8 the Alabama Democratic Conference, and the district
- 9 court held that the changes to that district were based
- 10 on politics.
- Now, with respect to the plan as a whole,
- 12 our response has always been that there is a lot of
- 13 factors that went into drawing the plan as a whole and
- 14 when it's drawing any specific district. And I think
- 15 it's important here that the Plaintiffs have never
- 16 proposed a redistricting plan that actually meets our
- 17 race-neutral redistricting criteria, especially the
- 18 2 percent deviation in population that the legislature
- 19 adopted. And I think that's important for three
- 20 reasons.
- 21 JUSTICE KAGAN: Are you really saying that
- 22 that's a pleading requirement, that they have to come in
- 23 with a plan that meets all the rest of your criteria?
- 24 MR. BRASHER: I do not believe that is a
- 25 pleading requirement. I believe it's an evidentiary

- 1 issue and I think the Court held that much in Cromartie.
- 2 And I think it's important for three reasons. First,
- 3 the legislature adopted that 2 percent deviation to end
- 4 the previous partisan gerrymander that the Democrats
- 5 adopted in 2001, where they systematically
- 6 underpopulated majority-black districts and
- 7 overpopulated majority-white districts in Republican
- 8 areas of the State, and that's why the Plaintiff's
- 9 brought a partisan gerrymandering claim in the district
- 10 court below.
- 11 And the second reason is what I was alluding
- 12 to earlier, and that's in Easley v. Cromartie, the Court
- 13 held that the first step of a racial gerrymandering
- 14 claim is to show that there's some conceivable way to do
- 15 this differentially that creates greater racial balance.
- 16 And the facts that they -- they've never produced a plan
- 17 that actually does that is a serious problem. And that
- 18 makes sense, because if you want to see if race was
- 19 predominant in redistricting, you take race out and then
- 20 you run it again and you see what happens.
- JUSTICE KAGAN: Mr. Brasher, I mean, let me
- 22 just give you some numbers here from -- from some of
- 23 these districts. Right? HD 52, you needed to add 1145
- 24 African Americans in order to maintain the percentage of
- 25 African-American voters, which was your number 2

- 1 criterion. You added 1143. You missed by 2. HD 55,
- 2 you needed to add 6981. You added 6994. SD 23, 15,069.
- 3 You hit at 15,185.
- I mean, those numbers speak for themselves,
- 5 don't they? That in each of these cases, you were
- 6 determined, come what may and disregarding other
- 7 criteria, to maintain the black voting age population.
- 8 MR. BRASHER: I don't think that shows that
- 9 for two reasons. First, I agree with the United States
- 10 Solicitor General that the question here is whether we
- 11 subordinated race-neutral redistricting criteria to hit
- 12 these targets.
- 13 JUSTICE KAGAN: That was just a coincidence?
- 14 MR. BRASHER: No. But that goes to my
- 15 second point, is those House districts that you were
- 16 reading off are in the City of Birmingham. The City of
- 17 Birmingham has over 200,000 people in it, 73 percent
- 18 black.
- 19 JUSTICE KAGAN: Well, it's 73 percent, and
- 20 you hit that 73 percent exactly.
- MR. BRASHER: Well, and that's my point.
- 22 There are at least going to be some of those House
- 23 districts in Birmingham that are 73 percent black and I
- 24 do not believe that in a place where there's more than
- 25 200,000 people and 73 percent of them are black you need

- 1 to subordinate race-neutral redistricting criteria to
- 2 draw a 73 percent black district.
- 3 JUSTICE KAGAN: Well, I think you kind of do
- 4 actually, because, I mean, you're trying to repopulate
- 5 these districts, and many of these districts, yes, there
- 6 are many, many, many African Americans. But as you just
- 7 suggested, there are also white people. And you did it
- 8 so that you, you know, completely replicated the exact
- 9 percentage figure.
- 10 MR. BRASHER: Well, I'll give you another
- 11 example of what I mean. House District 67, which we
- 12 talk about in our briefs, is a single-county district.
- 13 It's always been a single-county district. It's a
- 14 single-county district in our plan, and it's a
- 15 single-county district in every plan that the Plaintiffs
- 16 propose. And it's always going to be 70 percent black
- 17 because that county is 70 percent black.
- 18 And I think the same thing could be said
- 19 about many of the neighborhoods in Birmingham, is that
- 20 these neighborhoods are 73 percent black and that's how
- 21 we hit the numbers. And they certainly haven't proven
- 22 otherwise.
- 23 I also think that the 2 percent -- the
- 24 failure to propose a 2 percent plan is important because
- 25 a 10 percent plan, the plans that they actually have

- 1 proposed, are drastically different from a 2 percent
- 2 plan. It's like comparing a plan with 100 districts to
- 3 one with only 80 districts. Their Senate districts can
- 4 vary by 14,000 people, and ours can only vary by around
- 5 2,000 people.
- 6 And -- but even though these -- these plans
- 7 are drastically different with respect to the criteria
- 8 that the legislature adopted here, many of their
- 9 districts have exactly the same black population
- 10 percentage as our districts. This is clearest if you
- 11 look at on page 36 of our brief where we lay out the
- 12 Senate districts and their own proposed plans next to
- 13 the Senate districts and our proposed plan. And you'll
- 14 look and you'll see Senate District 18, 19, 20, some of
- 15 the Senate districts that Justice Kagan was talking
- 16 about earlier, are almost exactly the same in all three
- 17 plans.
- 18 If you look at Senate District 33, it's
- 19 exactly the same in our plan and in the Black Caucus's
- 20 proposed plan. The evidence was that the only way you
- 21 could draw Senate District 33 with a different black
- 22 population percentage --
- 23 JUSTICE KENNEDY: What about District --
- 24 Senate District 26?
- 25 MR. BRASHER: Senate District 26 was above

- 1 70 percent black in the previous plan and it's above
- 2 70 percent black in our plan and in the Black Caucus's
- 3 plan. Now, it's not exactly on target, but the
- 4 Plaintiffs testified in this case that the area of
- 5 Montgomery City that we're talking about here is
- 6 99 percent black.
- 7 And because that was one of the Senate
- 8 districts that they actually challenged, we have
- 9 actually good-faith credibility determination from the
- 10 trial court because the drafters actually testified
- 11 about why they made the changes to Senate District 26
- 12 they made, and they said that because of the way
- 13 populations shifted, they had to change an adjoining
- 14 district, Senate District 30, which required changes
- 15 to -- to all of the rest of the districts. And that
- 16 left a county, sort of an orphan county, Crenshaw
- 17 County, that is a rural county south of Montgomery.
- 18 They explained that what they did is they took part of
- 19 Senate -- former Senate District 26, took it out to make
- 20 a way to connect the rural Crenshaw County to the rest
- 21 of Senate District 25, which is already predominantly
- 22 rural.
- 23 JUSTICE ALITO: Well, the Solicitor General
- 24 just said that if you look at that district, it has a
- 25 very bizarre shape and the effect of the bizarre shape

- 1 is to pull in predominantly African-American areas and
- 2 exclude predominantly white areas. Is he correct on
- 3 that?
- 4 MR. BRASHER: Actually, I respectfully
- 5 disagree with him about that. I -- if you look at the
- 6 comparison map, it's in the Joint Appendix on 197, you
- 7 can see a comparison between the former district and the
- 8 current district. And what you'll see is up at the
- 9 right -- I'm sorry, the -- let me try and orient
- 10 myself -- the left -- the left part of Montgomery
- 11 County, that's where the former district used to be. It
- 12 was part of Senate District 25 that came into the middle
- 13 of that district, sort of a -- kind of came in the
- 14 middle of it. And what the drafters did here is they
- 15 drew the lines closer to the City of Montgomery, and
- 16 they preserved that part of Senate District 25 that came
- in the middle of it. What they -- the only thing they
- 18 did is they took some precincts and some parts of
- 19 precincts, kind of along those lines, and they moved
- 20 them from Senate District 25 to Senate District 26.
- 21 And I want to also just correct something
- 22 that the -- my friend the Solicitor General said. We
- 23 didn't just move black voters into that district. We
- 24 also moved Hispanic voters into that district, we moved
- 25 white voters into that district. We made changes to

- 1 that --
- JUSTICE KAGAN: Mr. -- Mr. Brasher, I mean,
- 3 usually in these cases you're looking at these
- 4 funny-shaped districts and you're trying to figure out
- 5 from the shape and from other matters whether race has
- 6 been used instead of traditional districting criteria.
- 7 But this is a very sort -- you know, sort of sui generis
- 8 Shaw claim, because here the principal evidence in the
- 9 case is not all the circumstantial stuff that we usually
- 10 do. It's a policy statement from the State that says
- 11 race non-retrogression is going to be our principal
- 12 criterion except for Reynolds, and then a clear
- 13 testimony from the people who were applying that policy
- 14 statement that they thought that that meant maintaining
- 15 the black voting age population, something which is a
- 16 mistaken understanding of what retrogression entails.
- But, you know, you don't have to look at all
- 18 the circumstantial evidence about the shape of districts
- 19 when you have a policy statement from the State saying
- 20 this is our number one criterion except for Reynolds and
- 21 this is how we understand it in such a way that it's
- 22 going to ensure that a 68 percent district stays a
- 23 68 percent district and a 52 percent district stays a
- 24 52 percent district and so on.
- 25 MR. BRASHER: Well, just two quick responses

- 1 to that, Justice Kagan. And the first is that the State
- 2 is always going to say that complying with Federal law
- 3 was a top priority because Federal law is supreme. And
- 4 so if simply --
- 5 JUSTICE KAGAN: But this is much more than
- 6 that. This is very specific saying where the -- the --
- 7 the two legislators principally in charge of this said
- 8 this is what we understand the requirements are, that
- 9 we're going to maintain the black voting age population
- 10 in each district.
- MR. BRASHER: Well, that brings me to my
- 12 second point, which is that imagine had we done the same
- 13 thing that the plaintiffs are suggesting, and we had
- 14 hired a political scientist to tell us that 55 percent
- 15 should be the target. I don't think that we could say
- 16 race predominated in that circumstance, just because we
- 17 had a different target. And so I think they are
- 18 bringing effectively a circumstantial case here. They
- 19 have the fact that we said that this was our objective
- 20 under Section 5 --
- 21 JUSTICE KENNEDY: Well, Justice Kagan's
- 22 question points up the fact that the defenders of this
- 23 plan did not rely on the fact that it was a political
- 24 gerrymander and, of course, they said it was the
- 25 2 percent call, but the basis was race in order to

- 1 comply with Section 5.
- 2 MR. BRASHER: And my point about that is
- 3 certainly with respect to specific districts, they were
- 4 based on partisanship, and so had they challenged
- 5 specific districts, we would have responded in kind with
- 6 respect to those specific districts. But they never
- 7 challenged specific districts below.
- 8 And I think to answer Justice Alito's
- 9 question, to my friends on the other side, I think you
- 10 should look at document 194 which is the Black Caucus!
- 11 posttrial brief. And although they certainly mention an
- 12 occasional specific district, they didn't have any
- 13 evidence. I guess this goes back to Justice Kagan's
- 14 question. This is a circumstantial case because the
- 15 only evidence --
- 16 JUSTICE GINSBURG: Considerable evidence on
- 17 the Senate District 26.
- 18 MR. BRASHER: Senate District 26 was
- 19 challenged by the Alabama Democratic Conference, which
- 20 has now not brought a Shaw claim with respect to
- 21 district 26. And because they specifically challenged
- 22 that district, you actually have, like I said, a
- 23 credibility determination by the district court about
- 24 the testimony with respect to that specific district.
- 25 JUSTICE GINSBURG: Let me ask you about this

- 1 Section 5 mistake. Isn't it so that both the district
- 2 court and Alabama were laboring under the impression
- 3 that retrogression meant you have to keep the same
- 4 numbers?
- 5 MR. BRASHER: The district court made an
- 6 express fact-finding here that our goal was to prevent
- 7 substantial reductions in black population in the
- 8 preexisting majority black districts.
- 9 JUSTICE GINSBURG: And if that's a
- 10 misunderstanding of what Section 5 requires, then the
- 11 whole thing is infected by that mistake.
- 12 MR. BRASHER: Well, I disagree with you
- 13 respectfully about it being a misunderstanding, because
- 14 I think in 2006, Congress told us that we could not
- 15 diminish the ability to elect the black voters in a
- 16 preexisting majority black district.
- 17 My friend, Professor Pildes, testified
- 18 against the inclusion of that language in Congress, and
- 19 he told them that if they included that language, it
- 20 would "lock into place" the majority black districts in
- 21 the South. If you cannot diminish the ability to elect,
- that means if there's a safe majority black district
- 23 where there's a 100 percent chance that black voters can
- 24 elect their candidates of choice, you cannot drop that
- 25 to where they simply have a 50 percent chance, or a 60

- 1 percent chance. And that was what we were setting out
- 2 to do. And this Court said that States get leeway in
- 3 complying with Section 5 and the Equal Protection Clause
- 4 and we do not have to hit things right on the dot.
- 5 JUSTICE KAGAN: Mr. Brasher, I quess I don't
- 6 understand your response to Justice Ginsburg. I mean,
- 7 there are different interpretations of what those 2006
- 8 amendments mean, right? Under one interpretation, it
- 9 was basically a codification of Justice Souter's
- 10 opinion, and so majority minority districts could be
- 11 transformed into influence districts.
- 12 On another stricter interpretation, perhaps,
- 13 no majority minority districts had to stay majority
- 14 minority districts. But in no interpretation does a 76
- 15 percent district have to stay a 76 percent district when
- 16 circumstances change and when the ability to elect
- 17 candidates of one's choice does not require it.
- 18 MR. BRASHER: Well, this is what Justice
- 19 Souter said in his dissent in Georgia v. Ashcroft. He
- 20 said, "If racial elements consistently vote in separate
- 21 blocks," which it's conceded they do in Alabama,
- 22 "decreasing the proportion of black voters would
- 23 generally reduce the chance that the minority group's
- 24 favored candidate would be elected."
- The majority opinion in Georgia v. Ashcroft

- 1 agreed with that as well. And the district court in
- 2 Georgia v. Ashcroft, which I think that Congress was
- 3 trying to go back to, said, "If existing opportunities
- 4 of minority voters to exercise their franchise are
- 5 robust, a proposed plan that leaves those voters with
- 6 merely a reasonable or fair chance of electing a
- 7 candidate of choice may constitute retrogression."
- 8 And the testimony from the plaintiffs' own
- 9 expert here was that majority black districts in Alabama
- 10 that are only 55 percent black would only give those
- 11 voters a reasonable opportunity to elect.
- 12 JUSTICE BREYER: Suppose we, I don't know, I
- 13 want to know what you think about the practicalities of
- 14 sending this back. Assume -- assume in the back of my
- 15 mind just relying on State policy is this. A State
- 16 legislator gets up and says, in our State, there's a
- 17 history of discrimination against black people. There
- 18 are very few black representatives in this body. I
- 19 would like to find a way of drawing district lines so
- 20 that we have a few more. Okay?
- 21 That's the normal way this case comes up.
- 22 This is an obverse and odd situation. All right. I
- 23 don't know that that statement should automatically
- 24 disqualify his plan. Maybe we should look a little
- 25 further into it and see what they actually did.

- 1 Suppose I start there. And then I say,
- 2 okay, you go proceed district by district. I suspect
- 3 they will be able to prove that at least in some
- 4 districts, at least in some, the statement of the
- 5 legislator here did prevail and did make a difference.
- Now, if that's so, they don't have Section 5
- 7 to rely on as a defense. So I don't know what the
- 8 defense is possibly going to be. And since we can't
- 9 even think what the defense is, why don't they just redo
- 10 this plan over in the legislature and save everybody a
- 11 lot of time and trouble. What's your response to that?
- MR. BRASHER: There are a couple of
- 13 responses. The first is, I think --
- 14 JUSTICE SCALIA: I thought it was a lot of
- 15 trouble to redo a plan. Is it not a lot of trouble?
- 16 MR. BRASHER: It is a lot of trouble.
- 17 JUSTICE BREYER: So my point of my question
- 18 is you want to go to that lot of trouble before a lot of
- 19 extra trouble in court proceedings, or do you want to go
- 20 to that trouble right off the bat and get it over with?
- I expect you'd have an answer to that, and
- 22 I'm not taking a point of view. I just want to know
- 23 what your response is.
- MR. BRASHER: Well, to respond to that
- 25 pointed question, this plan was passed after 21 hearings

- 1 held throughout the State of Alabama. It was passed
- 2 after extensive legislative negotiations. It was passed
- 3 in a special session of the Alabama legislature that was
- 4 called for purposes of enacting a redistricting plan.
- 5 So we do not want to go back through that process --
- 6 JUSTICE BREYER: Of course you don't, but my
- 7 question is, is there going to be a defense left that
- 8 could stop you from having to go back?
- 9 MR. BRASHER: Yes.
- 10 JUSTICE BREYER: What?
- 11 MR. BRASHER: I think the United States
- 12 agrees with me that the question here is whether there
- 13 was a strong basis in evidence for us to believe at the
- 14 time that we passed this plan that we had to comply with
- 15 Section 5, and I think we have that defense, even if we
- 16 are litigating district by district. But let me --
- 17 JUSTICE GINSBURG: What does it mean to
- 18 comply with Section 5? And that's where you can say it
- 19 strongly -- it complies -- everybody agrees that that
- 20 counts, compliance with Section 5, strong interest in
- 21 doing that. But if you think Section 5 means you got to
- 22 preserve the same numbers and that's not what Section 5
- 23 means, then the whole premise on which the district
- 24 court based its decision was wrong.
- 25 MR. BRASHER: Well, I don't think so,

- 1 because I think the district court's decision was
- 2 premised on the fact that race was not the predominant
- 3 factor in this plan. But to go to that question about
- 4 Section 5, we adopted a very reasonable Section 5
- 5 preclearance strategy here. It was the exact same thing
- 6 that Georgia did in 2005 and that Congress said in the
- 7 House report when it reauthorized Section 5 in 2006 --
- 8 JUSTICE SCALIA: If that turns out to be
- 9 wrong, I guess you're still not guilty of using race.
- 10 You're still trying to comply with Section 5 as opposed
- 11 to being racist; right?
- 12 MR. BRASHER: That's exactly right. They
- 13 did make intentional discrimination claims in the
- 14 district court --
- 15 JUSTICE KENNEDY: If the district court said
- 16 that race was not the purpose, what in the district
- 17 court's view was the purpose of the plan?
- 18 MR. BRASHER: Well, I don't think there's a
- 19 need for a district court to identify any one specific
- 20 purpose.
- 21 JUSTICE KENNEDY: I'm asking in this case,
- 22 what do you think?
- MR. BRASHER: Yes.
- JUSTICE KENNEDY: Was it the presumption
- 25 that they wanted to assure preclearance under Section 5

- 1 and for that reason used race? So when you say the
- 2 district court said, well, race was not the purpose, it
- 3 was close to the purpose because they were trying to use
- 4 Section 5 and use race for that reason.
- 5 MR. BRASHER: Well, it was certainly --
- 6 JUSTICE KENNEDY: That's a very fine
- 7 distinction.
- 8 MR. BRASHER: It was certainly a purpose
- 9 that went into the majority black districts, but it was
- 10 not the predominant motive in the way these laws were
- 11 drafted.
- 12 JUSTICE SCALIA: Don't you have to use race
- 13 to comply with Section 5?
- 14 MR. BRASHER: That's right.
- 15 JUSTICE SCALIA: Is there any way to comply
- 16 with Section 5 without using race?
- 17 MR. BRASHER: There is not.
- 18 JUSTICE KAGAN: But you don't have to use
- 19 race in this way, Mr. Brasher. Nobody would say that
- 20 Section 5 required you to maintain a 78 percent district
- 21 and a 78 percent district was no longer needed with
- 22 respect to a group's ability to elect a candidate of
- 23 choice.
- MR. BRASHER: Well, I respectfully disagree
- 25 with that. And once again, we followed the same

- 1 preclearance strategy that Georgia followed in 2005.
- 2 And that Congress -- remember, Congress made a record in
- 3 2006 to try to reauthorize Section 5 and part of that
- 4 record was them saying that Georgia's plan from 2005,
- 5 which kept all of their majority black districts exactly
- 6 the same was a good thing. We did the same thing in
- 7 this redistricting cycle that other States did in this
- 8 redistricting cycle. We actually did the same thing
- 9 that the plaintiffs did when they were in charge of the
- 10 legislature in 2001. There's been some inconsistency on
- 11 that. The only difference is they tried to hit targets
- 12 from the 1993 plan as they were in 1993, and we simply
- 13 tried to keep the districts the same from 2010 to 2012.
- 14 JUSTICE ALITO: Could I follow up on
- 15 Justice Breyer's exploration of what would happen if
- 16 this was done over? I assume that Section 5 would not
- 17 be a consideration so long as a new coverage formula is
- 18 not adopted by Congress. Is that correct?
- 19 MR. BRASHER: Correct. If the legislature
- 20 were to pass new plans, I do not think that they would
- 21 have to comply.
- 22 JUSTICE ALITO: And the legislature could do
- 23 whatever it wants if it's -- if it relies purely on
- 24 partisanship rather than on race.
- 25 MR. BRASHER: That is correct.

- 1 JUSTICE ALITO: And to what degree would or
- 2 could -- to what degree would the legislature be
- 3 justified in doing and to what degree would it be
- 4 required to take into account the degree, if any, to
- 5 which Section 2 imposes something like a retrogression
- 6 requirement?
- 7 MR. BRASHER: Well, I think --
- 8 JUSTICE ALITO: And do we know what that
- 9 might be?
- 10 MR. BRASHER: I really honestly do not know
- 11 how Section 2 would necessarily apply in this
- 12 circumstance because by complying with Section 5 here,
- 13 we -- we necessarily complied with Section 2 because
- 14 it's a lesser standard.
- 15 But I do think that it's -- the fact that we
- 16 could have done, if we -- if the plans are vacated, they
- 17 are very likely to just be the same plans
- 18 reauthorized --
- 19 JUSTICE ALITO: What would happen if you --
- 20 if you're -- if on a do-over, the objective was to
- 21 produce maximum Republican representation in both houses
- 22 of the legislature. And the way in -- and in doing
- 23 that, there was a drastic reduction in the number of
- 24 African-American senators and representatives. Would
- 25 that be a violation of Section 2?

1 MR. BRASHER: Not necessarily. There would, 2 obviously, be a lot more that would go into that 3 analysis whether that violated Section 2. You'd have to 4 look at each individual district and see if they can 5 make a Section 2 claim. I mean, one of the issues in 6 this case is that this plan actually gives proportional 7 representation to black voters in Alabama. There are 8 about 25 percent black voting age population in Alabama, 9 and they have about 25 majority black districts in the House and about 20 -- I'm sorry, about 25 percent 10 majority black districts in the House and about 25 11 12 percent majority black districts in the Senate. And so 13 this is -- this plan meets Section 2 in that regard in 14 the sense that it gives proportional representation. 15 But I do not know what would happen, quite frankly, if this -- if the Court were to vacate these 16 17 plans and the legislature were to just do a do-over. 18 And I would -- to go back to the 2 percent 19 deviation, these are very sophisticated parties on the 20 other side of this case with very sophisticated counsel. 21 The reason they've never proposed any way to do this 22 following our own race-neutral redistricting criteria is 23 because they know that the 2 percent deviation here 24 prevents them from gerrymandering districts to help white Democrats get elected because it would be very 25

- 1 simple. The 2 percent deviation was adopted at the very
- 2 beginning of this redistricting process, so the
- 3 plaintiffs had a year, while they were on the committee,
- 4 the reapportionment committee, to come up with their own
- 5 2 percent plan. And instead, they just proposed these
- 6 10 percent deviation plans in the legislature.
- 7 And then we had a year of litigation for
- 8 them to come up with own 2 percent plan, and they --
- 9 they didn't do that. And that's what the district court
- 10 was getting at when the district court said that -- you
- 11 know, the district court said race did not predominate
- 12 because we followed race-neutral redistricting criteria,
- 13 and then the district court suggested, you know what,
- 14 you know what this case is really about, it's about the
- 15 2 percent population deviation. Because --
- 16 JUSTICE KAGAN: Mr. Brasher, you're
- 17 suggesting that there's some necessity for a 2 percent
- 18 plan, but there is no necessity for a 2 percent plan.
- 19 States have routinely gone up to 10 percent without
- 20 getting into trouble under Reynolds. So that can't
- 21 insulate your plan from this kind of challenge, can it?
- 22 MR. BRASHER: Well, I think it can, and for
- 23 this reason, is because we're in charge of adopting our
- 24 race-neutral redistricting criteria. And under Easley,
- 25 if the plaintiffs want to prove that race predominated

- 1 in a plan, the first step of that, and certainly the
- 2 easiest way to do it, is to propose some other way of
- 3 meeting race-neutral redistricting criteria that
- 4 provides greater racial balance.
- 5 And they haven't proposed any way to do
- 6 than, and the plans that they did propose, even though
- 7 they are 10 percent plans, are very, very similar in
- 8 many of these majority black districts. So not only
- 9 have they not proposed a 2 percent plan that's our
- 10 criteria, but they actually -- the plans they did
- 11 propose are not -- not that different.
- I think at the very least, the fact that the
- 13 plaintiffs have never proposed any way to do this
- 14 redistricting that actually meets the State's
- 15 race-neutral redistricting criteria underscores that you
- 16 cannot find that the district courts fact-finding here
- 17 was clearly erroneous, that race did not predominate,
- 18 and I think the Court should affirm on that basis.
- 19 Let me address the question of remand for a
- 20 second here. The United States has said that the Court
- 21 should remand this case. But the United States'
- 22 position on that is internally inconsistent because the
- 23 United States agrees that the population percentages
- 24 alone in the districts are not sufficient for the
- 25 Plaintiffs to have met their burden of proof to show

- 1 that race predominated.
- 2 But that's the only evidence they introduced
- 3 about these districts, and that's why the district court
- 4 said, to the best that I can tell, these are statewide
- 5 challenges because the only evidence in the record,
- 6 whatever they may have said, the only evidence in the
- 7 record about these districts was just population
- 8 statistics.
- 9 JUSTICE BREYER: You'd look at the -- you'd
- 10 look at the complaint, when I look at the complaint, I
- 11 suspect I'll find something about districts. It's
- 12 certainly true that, sort of taking the US point of
- 13 view, the -- it's quite clear the -- to me anyway, that
- 14 the court decided on the basis of a statewide plan. So
- if it's wrong about that, then they ought to have a
- 16 chance to go back and make their claim district by
- 17 district and have a decision on that basis.
- 18 MR. BRASHER: Well -- and once again, I
- 19 don't think -- they may have brought claims with respect
- 20 to each individual district. I don't think they do. I
- 21 think if you look at the complaint, you won't find that.
- 22 But even if they did, the only evidence that
- 23 they introduced about any of these districts are the
- 24 statistics alone, and the United States agrees with me
- 25 that that's insufficient for them to have met their

- 1 burden of proof. So I don't see how you could reverse
- 2 the district's fact-finding as clearly erroneous that
- 3 race didn't predominant, given that all they introduced
- 4 was statistics.
- 5 I think The Court should affirm on the basis
- 6 of the fact-finding and not reach questions about
- 7 Section 5.
- 8 Unless the Court has any other questions,
- 9 that ends my -- thank you.
- 10 CHIEF JUSTICE ROBERTS: Thank you, counsel.
- 11 Professor Pildes, you have two minutes
- 12 remaining.
- 13 REBUTTAL ARGUMENT OF RICHARD PILDES
- ON BEHALF OF THE APPELLANT
- 15 MR. PILDES: Thank you very much, Mr. Chief
- 16 Justice.
- If I can, I'd like to address --
- 18 JUSTICE SOTOMAYOR: Is he right on that last
- 19 point? Earlier, one of the two of you said that if you
- 20 looked at the division of precincts, it was done on the
- 21 basis of this policy in almost every district. Was that
- 22 shown below?
- 23 MR. PILDES: We introduced all of that
- 24 precinct splitting information below and in our proposed
- 25 findings of fact, Document Number 196, some of which is

- 1 reproduced in one of the briefs. We made exactly this
- 2 point, yes, Your Honor.
- 3 JUSTICE SOTOMAYOR: What other -- besides
- 4 the statistics, what other evidence did you present?
- 5 MR. PILDES: Your Honor, we --
- 6 JUSTICE SOTOMAYOR: I can go back to the
- 7 Joint Appendix, but I just want a summary of it from
- 8 you.
- 9 MR. PILDES: Your Honor, the key fact we
- 10 presented, I think, that hasn't been discussed here is
- 11 that the Alabama Constitution prohibits the splitting of
- 12 counties. And they say they had a Supremacy Clause
- obligation to meet these racial targets, and that meant
- 14 they could override the Alabama's -- the Alabama
- 15 Constitution's protection of county boundaries and all
- 16 other State traditional districting principles.
- 17 And the 2 percent rule works the same way.
- 18 If that's actually a Federal constitutional requirement,
- 19 they can also override the key protections against
- 20 partisan gerrymandering. The very that few exist, the
- 21 only hard constraints, the county boundaries are
- 22 political subdivision boundaries, and it means they can
- 23 manipulate the all-important county delegations in the
- 24 Alabama legislature by breaking counties into multiple
- 25 districts and then deciding who runs the county by

- 1 putting their district in there.
- Now, a second question we answer that I
- 3 think has been very important in this discussion -- and,
- 4 by the way, I don't want to lose track of the fact that
- on remand, the Alabama legislature will have to comply
- 6 with the whole county provisions, or at least they can't
- 7 use this Federal excuse to split them.
- 8 The way most States do this is they either
- 9 start with traditional districting principles in the
- 10 core of existing districts and they look to see at the
- 11 end have we maintained the same number of
- 12 majority-minority districts, or if they start with a
- 13 number at the beginning, which they're not required to,
- 14 they ask what's necessary in current conditions to
- 15 preserve the ability to elect today.
- 16 That's what Alabama did in its 2001
- 17 submissions. It actually said that the number for the
- 18 ability to elect was a 55 percent black voting age
- 19 population. That's in its official submissions to the
- 20 United States.
- 21 CHIEF JUSTICE ROBERTS: Thank you, counsel.
- The case is submitted.
- 23 (Whereupon, at 11:15 a.m., the case in the
- 24 above-entitled matter was submitted.

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